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IN THE

Supreme Court of the United States

October Term, 1963

No. 641

JOHN CIMINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

John Cimino prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 23, 1963.

Citations to Opinions Below

There was no opinion in the District Court. The opinion of the Second Circuit Court of Appeals is reported as *United States v. Cimino and D'Ercole*, 321 F. 2d 509.*

* The instant petition is in the nature of a cross petition with that of the co-petitioner, Joseph D'Ercole whose record and appendix are by reference incorporated herein.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1963. A petition for rehearing was timely made and denied on September 24, 1963. The jurisdiction of the Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Are a defendant's constitutional rights in a non-jury criminal case violated when the Judge is presented, under the Jencks Act, with a document which reveals the defendant's prior conviction of the same crime with which he is charged?

2. Should the rule of *Roviaro v. United States* (353 U. S. 53) be extended to require the Government to produce an informer where the evidence of guilt is barely sufficient, if sufficient at all, and where the testimony of the informer could tip the scales in favor of guilt or innocence?

Constitutional Provision Involved

The petition raises issues under the Due Process Clause of the Constitution.

Statement of the Case

The petitioner, Cimino, was indicted with one D'Ercole for two substantive violations and a conspiracy to violate the Federal Narcotic Laws, Title 21, U.S.C. §§ 173, 174 and he and his co-defendant were convicted on both the substantive and conspiracy counts after a trial before Hon.

Frederick van Pelt Bryan, United States District Judge for the Southern District of New York, without a jury. The petitioner has been sentenced to a term of 20 years on each of the three counts, the sentences to run concurrently.

At the trial, the Government relied mainly on the testimony of four narcotics agents, Myron B. Avant, David B. Costa, Jack L. Golde and Frank Dolce, who testified about events leading to the sale of narcotics on November 10, 1960 and November 22, 1960. A more detailed presentation has been set forth in the cross-petition.

Reasons for Granting the Writ

1. This Court has never passed upon the important issue of constitutional law and federal trial procedure of whether a defendant's rights in a non-jury criminal case are irretrievably prejudiced where the trial judge, inspecting a document under the Jencks Act, is informed of the defendant's prior conviction of the same crime as that for which he is being tried.

On the second day of trial, while Narcotics Agent Costa was testifying, the petitioner sought the production, under the Jencks Act, 18 U.S.C. § 3500, of a report which had been made by the agent. The report concerned was "in effect a compendium of all the information contained in (Costa's) memorandum reports" and it was based "not only on his own actions, his own observations, but also, of course, things related to him by other officers assisting in the investigation". Marked and introduced as Court's Exhibit 16 for identification and reproduced on pages 94a-104a of the petitioner's appendix before this Court, the report is seen to contain varied information, including the cross petitioner's prior conviction of two narcotics offenses.

(96a) and the statements that "the source of supply for Cimino was D'Ercole. D'Ercole is part of the Italian organization in the East Harlem area".

Both the Trial Court and the Court of Appeals in this case were of the opinion that the conflict thus described is an inevitable one and that the defendant's rights under the circumstances must be sacrificed to the necessity of enforcing the Jencks Act. It is the petitioner's contention that, in the first place, this conflict is *not* inevitable at all and, in the second place, that the threat to a defendant's rights posed under these circumstances is so very grave as to require some extraordinary remedy.

Since this Court has never passed upon the issue thus raised and since grave prejudice to a defendant is unnecessarily imposed upon a defendant by the rule sanctioned by the Circuit Court in this case, this Court should grant certiorari.

2. This case poses a novel, interesting and substantial question as to the extension of the rule of *Roviaro v. United States* (353 U. S. 53), so as to require the Government, under special circumstances, not only to name, but also to produce an informer at trial.

Considering the abuses which a system of faceless paid informers may spawn, this Court should re-examine its rule in *Roviaro* and extend it in the limited fashion of requiring the Government to produce an informer at trial where the informer was within the Government's control at the time of indictment and where the evidence of guilt is weak. Such a rule would in no sense impair the proper use of informers and, yet, it would have the virtue of giving actual substance to what is often only the idle gesture required under *Roviaro*.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER,
THEODORE KRIEGER,
JOSEPH A. NOTARO,
Counsel for Petitioner.

November 19, 1963